IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2008-KA-00609-COA

RONREGUS FLOWERS — APPELLANT

VERSUS

STATE OF MISSISSIPPI — APPELLEE

APPEAL FROM THE CIRCUIT COURT OF THE 1ST JUDICIAL DISTRICT
OF
HINDS COUNTY, MISSISSIPPI

BRIEF ON THE MERITS BY APPELLANT

OFFICE OF THE PUBLIC DEFENDER,
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STATEMENT OF THE ISSUES

I. The trial judge erred in ruling that statements of Mr. Flowers to Deputy Butler were inadmissible hearsay, as the court thus impermissibly violated his fundamental right to present a defense as guaranteed by both federal and state constitutions;

II. The trial court abused its discretion in rejecting Jury Instruction D-7 on necessity, depriving Mr. Flowers of his fundamental right to present his theory of defense to the jury, and

III. The trial court erred in permitting the prosecution to cross-examine Mr. Flowers regarding another unrelated crime to the irredeemable prejudice of Mr. Flowers.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS BELOW

Ronregus Flowers was indicted by a Hinds County grand jury of the 1st Judicial District in Cause Number 04-0-126 for house burglary in violation of MISS. CODE ANN. § 97-17-23 (1972) in connection with the December 15, 2003 entry into the home of Mrs. Alvera Jones, Eugene Street, Terry, Mississippi. CP 4; T. 125.

Mr. Flowers proceeded to trial on September 17, 2007 and on September 18, 2007, he was found guilty of the charge by a duly constituted jury of his peers. T. 219; RE 9; CP 21. On December 3, 2007, he was sentenced to ten (10) years imprisonment in the custody of the Mississippi Department of Corrections, with two (2) years post release supervision, mandatory treatment of alcohol and drug abuse and evaluation for obtaining a high school equivalency certificate. CP 24; T. 233.

Upon prosecution of post-trial motions, all of which were denied, Mr. Flowers filed his notice of appeal, now before this honorable Court. RE 11; CP 29; 30; T. 239.

B. STATEMENT OF FACTS

On the morning of December 15, 2003, Ronregus Flowers found himself running down Eugene Street in Terry, about a mile and a half from his own home. T. 156. Mr. Flowers passed an abandoned trailer, grown up in bushes, then ran to the door of Mrs. Alvera Jones. T. 156. Mr. Flowers testified at trial that he was running because he had seen someone, a "dude" he did not know, pointing a gun at him from some bushes. T. 156; 159. When he knocked and no one answered the door at Mrs. Jones, Mr. Flowers testified he broke in the front door, went through the

living room, into a hallway and a small bedroom to the right. T. 157. Mr. Flowers testified there was a small bed there, and he could not crawl under it; he looked for a telephone to summon help but did not see one. T. 157; 159. Christmas gifts, some wrapped, were in the room where he sought refuge, Mr. Flowers testified, but he was more concerned about remaining hidden from his unknown assailant. T. 161. To that end, he removed an antique mirror in the hallway of Mrs. Jones' home and placed in on the floor, reflective side against the wall. T. 157. This was necessary because anyone looking in the house could see him in the bedroom, he testified. T. 157.

Predictably, the testimony of some on-lookers was decidedly different. James Funches, who lived across Eugene Street from Mrs. Jones, testified he was under the carport of his home, preparing to go hunting in a field behind his house when he spotted Mr. Flowers walk up to Mrs. Jones' front door and knock. T. 114-115. After no one answered, Funches testified Mr. Flowers shouldered through front door and went in. T. 115. Funches, who testified he knew Mr. Flowers because he lived in the neighborhood, told his mother to call police about a break-in at Mrs. Jones' home. T. 118. Funches testified he retrieved his hunting rifle and stood waiting by his truck. When Mr. Flowers came out of the house, Funches testified he had items in his hands which Mr. Flowers threw down and laid down on the porch. T. 119.

Deputy William L. Butler was dispatched to the scene on a report of some neighbors holding a burglary suspect at gunpoint. T. 140-141. Upon arrival, he saw a man later identified as Mr. Flowers laid out on the front porch with his upper torso outside the front door and lower body inside the house. T. 142. Mr. Flowers

immediately admitted to Deputy Butler breaking in, but entreated Butler to get him away from the scene because "[s]omeone is trying to kill me. That is why I went in the house." T. 144-145; *Exhibit 8 for Identification.* At that point, Butler advised Mr. Flowers to quit talking and the deputy Mirandized Mr. Flowers. T. 142; 145.

Mrs. Jones said she had stored Christmas gifts for her two grandchildren in the front room, which had no bed. T. 129-130; 132; 137. Some gifts were wrapped, some were not. T. 132. Upon her return home after the break-in, Mrs. Jones said some bags from that room were pulled into the living room and some in the hallway and boxes had been torn open and crushed or busted open. T. 134; 137. Deputy Butler, however, testified that "there wasn't anything that I could see right there by the front door like somebody was fixing to take out." T. 150.

SUMMARY OF THE ARGUMENT

The trial court failed to properly apply MISSISSIPPI RULE OF EVIDENCE (MISS.R.EVID.) 801(d)(2)(A) to find that statements Mr. Flowers made to Deputy Butler were *not* hearsay. As a matter of law, extrajudicial statements by an accused are always admissible and under the rule, are specifically *not* hearsay. The trial court thus impermissibly cut off the opportunity of Mr. Flowers to present a defense of necessity, of hiding to avoid being killed, by full cross-examination of Deputy Butler.

The trial court also erred when it denied Instruction D-7 which presented Mr. Flowers' theory of defense to the jury. The trial court clearly failed to use the appropriate standard in evaluating the requested instruction, a standard that requires review in the light most favorable to the accused. The disputed instruction correctly stated the law, no other instruction covered the issue and an evidentiary basis existed for giving the instruction. Failure to give the requested instruction amounts to reversible error under Mississippi law.

Finally, after confessing an *ore tenus Motion in Limine* just prior to taking testimony, the prosecutor cross-examined Mr. Flowers regarding criminal conduct in a separate indictment, in violation of the evidentiary rules and state case law.

ARGUMENT

I. The trial judge erred in ruling that statements of Mr. Flowers to Deputy Butler were inadmissible hearsay, as the court thus impermissibly violated his fundamental right to present a defense as guaranteed by both federal and state constitutions;

When counsel for Mr. Flowers sought to cross-examine Deputy William L. Butler regarding statements Mr. Flowers made at arrest, the state objected, arguing the statements the accused made were self-serving and inadmissible hearsay, subject to no exceptions. T. 143-145. The defense made several arguments in efforts to persuade the trial court the statements were not hearsay or subject to exceptions such as excited utterance (MISS.R.EVID. 803(2)) or then existing mental, emotional, or physical condition (MISS.R.EVID. 803(3)).

According to Butler's report, Mr. Flowers said, " 'I did it, just get me away from here.' The suspect continued to say those statements. The deputy advised him that he needed to remain silent. He [Mr. Flowers] stated, ' I don't care, just get me away from here. *Someone is trying to kill me. That is why I went into the house.*' " T. 145; *Exhibit 8 for Identification.* [emphasis added].

The trial court ruled that the statements from Deputy Butler's report (*Exhibit 8 for Identification*) were hearsay "admissions" and thus could not be offered by Mr. Flowers. T. 148; RE 12. The trial court rejected efforts by counsel for Mr. Flowers to cross-examine Butler about statements the accused made as Butler arrived on the scene.

This assignment of error is two-faceted: (1) The trial court's misclassification of the statement as hearsay (2) With the net effect that Mr. Flowers was essentially

deprived of his "meaningful opportunity to present a complete defense," due to denial of a full cross-examination of Deputy Butler, which would have corroborated his defense of necessity. *Crane v. Kentucky,* 476 U.S. 683 (1986). Cross-examination of Deputy Butler regarding the statements of Mr. Flowers went to demonstrate his lack of "intent to commit some crime therein" as required by the crime of house burglary under MISS. CODE ANN. § 97-17-23 (1972). This is an error of structural and fundamental proportions under both the state and federal constitutions and thus, is not amenable to harmless error analysis as discussed further below. AMENDS. V, VI, XIV, U.S. CONST.; ART. 3, § § 14, 26, MISS. CONST.

With all due respect for the trial court, as a matter of law, the statements by Mr. Flowers to Deputy Butler were not hearsay.

"Extrajudicial statements by a criminal defendant, so long as the statements are relevant to the matter being tried, are admissible in evidence." *Cobb v. State,* 734 So.2d 182, 185 (Miss.Ct.App. 1999). The case of Cobb, a snatch and grab from a local jewelry store, involved efforts by the accused to have his confession suppressed on the grounds that Cobb did not give it, that the deputy who took it completely fabricated its contents, which the accused refused to sign. *Cobb* goes on to say that, once there is "credible proof" the statements were made, contents of the statement are then admissible. *Id.* This Court held it was error to admit the disputed confession into evidence because Cobb never adopted it. The proper procedure, the Court said, "would have been *for the officer to relate from the stand those things that Cobb told him during the interrogation." Id.* [emphasis added] This Court in *Cobb* relied in part on MISS.R.EVID. 801(d)(2)(A), *Admission by a party-opponent,* which

states, "The statement is offered against a party and is (A) his own statement, in either his individual or representative capacity..." In this case, Mr. Flowers' statement to the deputy is *not* hearsay as defined in MISS.R.EVID. 801(d)(2)(A).

Clearly, these statements were relevant to the matter before the court – the alleged house burglary of the home of Alvera Jones. Just as clearly, these were statements made by Mr. Flowers as Deputy Butler arrived on the scene to arrest him.

Alternatively, even if these statements could be considered hearsay, they qualify as exceptions as an excited utterance under MISS.R.EVID. 803(2) for Mr. Flowers was plainly in apprehension of great bodily injury or death from his unknown assailant. The hearsay exception for present sense impressions under MISS.R.EVID. 803(1) may also apply as it was Mr. Flowers' contemporaneous explanation of why he was in the home of Mrs. Jones and why it was imperative that law enforcement remove him immediately from the scene.

Finally, as Mr. Flowers mentioned above, this limitation deprived him of his fundamental right to mount a "complete defense," as guaranteed under both state and federal constitutions. The statement "[s]*omeone is trying to kill me. That is why I went into the house,'* " uttered to Deputy Butler as he arrived on the scene is indicative of Mr. Flowers' lack of intent to commit a crime inside the home of Mrs. Jones. T. 145; *Exhibit 8 for Identification.*

The statements are not self-serving, but exculpatory of Mr. Flowers' intent on December 15, 2003.

Structural errors are those defects in the trial mechanism that "affect the framework within which the trial proceeds." *Arizona v. Fulminante*, 499 U.S. 279, 307-308 (1991). Mr. Flowers would respectfully suggest to this honorable Court that the trial court's limitation of critical cross-examination violated the constitutional standards of due process.

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, *as a minimum, a right to examine the witnesses against him*, to offer testimony, and to be represented by counsel. *In re Oliver*, 333 U.S. 257, 273 (1948). [emphasis added]

This right was denied to Mr. Flowers, who humbly asks this Court to reverse and vacate his conviction and remand for a new trial.

II. The trial court abused its discretion in rejecting Jury Instruction D-7 on necessity, depriving Mr. Flowers of his fundamental right to present his theory of defense to the jury;

Concomitant with the right to present a defense to the jury is the right to have the jury instructed as to the theory of defense by the accused, so long as (1) an evidentiary basis exists for the giving of the instruction; (2) the requested instruction does not duplicate another instruction and (3) is a correct statement of law. *Green v. State*, 884 So.2d 733, ¶ 3 (Miss. 2004) (Reversal of cocaine sale conviction for failure to give lesser offense instruction on sale of "bunk" or fake cocaine). If the requested instruction meets those three criteria, failure to give the instruction requires reversal. In evaluating the instruction, the trial court is required to view the evidence in the light most favorable to the accused. *Anderson v. State*, 571 So.2d 961, 964 (Miss. 1990).

> Even though based on meager evidence and highly unlikely, a defendant is entitled to have every legal defense he asserts to be submitted as a factual issue for determination by the jury under proper instruction of the court. Where a defendant's proffered instruction has an evidentiary basis, properly states the law, and is the only instruction presenting his theory of the case, refusal to grant it constitutes reversible error. *Hester v. State,* 602 So.2d 869 (Miss. 1992)

The testimony of Mr. Flowers provided a sufficient evidentiary basis. Mr. Flowers testified he was in flight from an unknown assailant in some bushes pointing a gun at him. T. 156; 159. Mr. Flowers apparently did not want to go to the abandoned trailer next door to Mrs. Jones because it was grown up with bushes and because he was in search of a telephone to summon the police. T. 159.

Jury Instruction D-7 stated:

The Court instructs the jury that the defense of necessity allows conduct which is ordinarily criminal to be excused where a person reasonably believes that he is in danger of physical harm. The defense has three elements: (1) the act charged must have been done to prevent a significant evil; (2) there must have been no adequate alternative; and (3) the harm caused must not have been disproportionate to the harm avoided.

If you believe from the evidence in this case that:

(1) Ronregus Flowers entered the home of Alvera Jones in order to avoid physical harm to his person;

(2) Ronregus Flowers had no alternative to enter the home; and

(3) Any harm caused by his entry into the home did not outweigh the physical harm he avoided to his person;

Then you should find Ronregus Flowers Not guilty.

In *Knight v. State,* 601 So.2d 403 (Miss. 1992), the Mississippi Supreme Court recognized the defense of necessity or "the proposition that where a person reasonably believes that he is in danger of physical harm he may be excused for some conduct which ordinarily would be criminal." *Id.,* at 405. Knight ran from the scene of an accident in which he struck a five-year-old child due to fear of physical

harm from the child's father. In reversing the trial court for failure to give Knight's requested necessity instruction, the Mississippi Supreme Court said the following:

> It is not for us to determine whether he was reasonable in fleeing under the circumstances. We are compelled to determine only whether a fair-minded jury could find that Knight was afraid, that fear motivated his action and that there were present circumstances which could induce that fear in a reasonable person in Knight's situation. We answer this question positively. *Id.*, at 406.

During argument over jury instructions, the prosecutor, apparently completely ignorant that such an instruction must be evaluated in the light most favorable to the accused, told the trial court: "Of course the jury would have to find that there was no reasonable alternative to the defendant breaking into Ms. Jones' house in order for a necessity instruction to be given. I don't believe 12 reasonable people would come anywhere close to agreeing to that, Your Honor." T. 182. The trial court subsequently denied the requested instruction. T. 184, RE 13.

Clearly, the standard for granting a jury instruction is *not* belief beyond a reasonable doubt. The correct standard is found in *Hester*, and just as clearly the trial court erred in denying the one instruction which presented the defense Mr. Flowers offered.

Therefore, this cause should be reversed and remanded for a new trial for failure to grant Mr. Flowers his sole jury instruction embodying his defense.

III. The trial court erred in permitting the prosecution to cross-examine Mr. Flowers regarding another unrelated crime to the irredeemable prejudice of Mr. Flowers.

Before testimony began, Mr. Flowers sought *ore tenus* a *Motion in Limine* in order to avoid mention of a strong-armed robbery indictment then pending. The following exchange occurred:

THE COURT: You don't intend to do that, do you?

MR. DOLEAC: No, sir, I don't.

T. 102.

Although the trial court did not specifically rule on the motion, the state clearly confessed the *motion in limine.*

Nevertheless, upon cross-examination the following exchange took place.

Q. Mr. Flowers, there is a dude pointing a gun at you. Is the reason that he's pointing a gun at you because you had a committed a crime against him?

MS. HARRIS: Objection, Your Honor. May we approach?

162 THE COURT: Approach.

(BENCH)

Q. (By Mr. Doleac) Mr. Flowers, let me back up a little bit. Isn't it true that the reason that you say you were running down the street because, quote, a dude pointed a gun at you was because you had previously by force taken away the car of a person named Mr. Houston –

MS. HARRIS: Objection, Your Honor.

THE COURT: Come back up.

(BENCH)

THE COURT: [excuses jury to jury room]

T. 161-162.

The prosecutor sought to question Mr. Flowers about another charge for which he had not been convicted, ostensibly to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." MISS.R. EVID. 404(b). The prosecutor also told the court the questions were invited because Mr. Flowers offered a defense of necessity which he contended made relevant questions regarding other separately charged acts. T. 164.

Respectfully, Mr. Flowers vehemently disagrees. Defense counsel was careful in direct examination.

Q. Okay. Now tell the jury why it is you were in Ms. Jones' house?

A. Because I was hiding from somebody was trying to shoot me.

Q. Okay. Did you tell the police officers that?

A. Yes, I did.

Q. Okay. You told Deputy butler that?

A. Yes, ma'm.

Q. Did you tell Deputy Brister, another officer there, that someone was trying to kill you?

A. Yes, I did.

Q. Okay. Did you see that individual with the gun?

A. Yes, I did.

Q. Do you know who it was?

A. Nope.

T. 156.

There was absolutely no evidence in this case whatsoever regarding efforts by Mr. Flowers to forcibly take away another individual's car.

It is the law of this country and this state that an accused stands trial only for those crimes for which he or she is indicted. In this case, there was *absolutely no legally defensible basis* for the prosecutor's questions regarding the alleged attempted taking of another's car.

> That an accused should be put to trial only for that with which he has been formally charged has long been accepted in our society. The accused is said entitled to reasonable advance notice of the charges he must answer at trial. The jury's attention should not be deflected nor its passions inflamed by evidence of other illegal or otherwise anti-social conduct of the defendant. Against this backdrop we enforce in the courts of this state a rule prohibiting presentations to the jury of any such extraneous evidence. *Hughes v. State*, 470 So.2d 1046-1047 (Miss. 1985).

Mr. Flowers admitted both on direct and cross-examination that he broke into the home of Mrs. Jones, but testified that he did so in fear of his life and to try to use the telephone to summon police. T. 156; 158-160.

The prosecutor in this case merely sought to put before the jury extraneous evidence of another charge, for which Mr. Flowers had not been convicted and inflame and prejudice the jury against him. Particularly when viewed against the other errors claimed herein, this cause should be reversed, the conviction of Mr. Flowers vacated and this case remanded for a new trial.

CONCLUSION

The trial court's error in classifying statements Mr. Flowers made to Deputy Butler as hearsay not only violated MISS.R.EVID. 801(d)(2)(A), but also had the effect of fatally hamstringing his effort to defend the charge lodged against him. Our federal constitution guarantees the accused the "meaningful opportunity to present a complete defense," an empty guarantee due to the trial court's error in this case. The trial court also erred in denying Mr. Flowers a jury instruction on the defense of necessity, for which the testimony of Mr. Flowers provided an adequate evidentiary basis. The jury was thus denied the opportunity to consider Mr. Flowers' defense.

Finally, Mississippi law essentially confines questioning to matters posed by the indictment for which one is being tried. The prosecutor, after originally confessing an *ore tenus Motion in Limine*, questioned Mr. Flowers regarding a separate charge, in violation of Mississippi evidence rules and case law.

For these reasons and the governing authority offered in support thereof, Mr. Flowers humbly seeks reversal of the trial court and remand for a new trial.

Respectfully submitted,

Virginia L. Watkins, [redacted]
Assistant Public Defender

Certificate of Service

I, the undersigned attorney, do hereby certify that I have this day caused to be hand-delivered a true and correct copy of the foregoing BRIEF OF APPELLANT ON THE MERITS to the following:

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So certified, this the 13th day of October, 2009.

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